United Nations **AT**

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1073

Case No. 1162: RODRIGUEZ

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Julio Barboza, Vice-President, presiding; Mr. Spyridon Flogaitis; Ms. Brigitte Stern;

Whereas, on 20 October 2000, Enrique Rodriguez, a staff member of the United Nations, filed an application containing pleas which read, in part, as follows:

"Section II: PLEAS

The Applicant respectfully requests the Tribunal to find that his promotion to [the] G-7 [level] is retroactive to 1 January 1998 and, for seniority purposes, to 1 January 1997 ...

The Applicant also requests reimbursement for expenses incurred in preparing submissions ... as well as compensation in the amount of [CHF] 40,000 for moral damage suffered ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 30 April 2001 and periodically thereafter until 31 October 2001;

Whereas the Respondent filed his Answer on 29 September 2001;

Whereas the Applicant filed Written Observations on 26 October 2001;

Whereas the facts in the case are as follows:

The Applicant entered the service of the International Trade Centre (ITC), an organ of both the United Nations Conference on Trade and Development and the World Trade Organization on 3 November 1980, on a one-year fixed-term contract as a Travel Clerk at the G-3 level. At the material time, he held a permanent appointment and the G-6 position of Travel Assistant.

On 17 December 1997, ITC information circular ITC/CIR/392, entitled "Job Classification Exercise 1997", was issued. The Information Circular advised staff members of a classification exercise that had been undertaken at ITC by an external classifier. On 29 December, the Applicant was informed that the Executive Director, ITC, (the Executive Director) had accepted the recommendation of the classifier that his post should remain classified at the G-6 level. On 7 January 1998, in accordance with ITC/CIR/392, the Applicant asked for a re-examination of this classification by a professional classifier. The professional classifier, who performed a "desk audit", recommended that the post be maintained at the G-6 level. On 26 February, the Applicant was advised that the Executive Director had accepted this recommendation.

On 26 March 1998, the Applicant requested a review of this classification by the Joint Classification and Appeals Review Committee (JCARC) in accordance with the provisions of ITC/CIR/392. On 2 February 1999, the JCARC accorded the Applicant's post 2053 points and recommended that it be classified at the G-7 level. On 23 April, the Executive Director wrote to the Ex-Officio Secretary, JCARC, requesting clarification of his role in the proceedings, as the report of the JCARC contained the seemingly contradictory statements that he had been told "not to participate in the attribution of points", but that he had

> "made several interventions to the members on definitions, validations and reference to seemingly pertinent points in the Job Description Questionnaire and the Common General Service Job Classification Standard for Geneva, as well as objectivity, facts, other similar posts in the same occupational group [and] consistency in the procedures".

Following the Ex-Officio Secretary's response, the Executive Director decided to seek a final opinion from another classification consultant.

On 5 October 1999, the classification consultant rated the Applicant's post 1835 points and recommended that it be classified at the G-6 level. On 20 October, the Applicant was advised that the Executive Director had accepted this recommendation and had confirmed the classification of the Applicant's post at the G-6 level. On 4 November, the Executive Director wrote to the Applicant outlining the criteria followed in the classification exercise and noting that, although he had received advice from experts and a recommendation from the JCARC, the final decision was his.

On 17 December 1999, the Applicant requested administrative review of the Executive Director's decision of 4 November.

On 29 May 2000, on the advice of the Chief, Personnel Section, ITC, the Applicant requested the Secretary-General's permission to submit his appeal directly to the Tribunal.

On 14 July 2000, following yet another classification exercise, the Applicant's post was classified at the G-7 level. The Applicant's responsibilities were officially extended to include signing all travel authorizations for the United Nations Development Programme on 16 August. On 25 August, the Applicant was informed that the Executive Director had decided to classify his post at the G-7 level: the Applicant requested that this classification be given retroactive effect to 1 January 1998 and, for seniority purposes, 1 January 1997, but his request was denied on 11 October by the Executive Director, who noted that the Applicant's recent increase in responsibilities had prompted the reclassification.

On 20 October 2000, the Applicant submitted the above-referenced Application to the Tribunal.

On 31 October 2000, the Executive Director approved the recommendation of the Appointment and Promotion Committee, ITC, (APC) that the Applicant be promoted to the G-7 level, with effect from 1 September 2000.

Whereas the Applicant's principal contentions are:

1. The Executive Director's decision to maintain the Applicant's post at the G-6 level was tainted by legal and factual errors.

2. The classification of the Applicant's post did not conform to the classification of similar posts in other organizations in the United Nations common system.

3. The Executive Director's decision of 11 October 2000 was incomplete and belated. The Applicant's responsibilities had increased earlier and warranted reclassification on 1 January 1998 not 1 September 2000.

Whereas the Respondent's principal contentions are:

1. The classification of the Applicant's post at the G-6 level was a proper exercise of administrative discretion and the Applicant's rights were not violated.

2. The Applicant's claim for retroactive promotion is without merit.

3. The Applicant's reference to the vacancy notices of other organizations in without merit.

The Tribunal, having deliberated from 5 to 26 July 2002, now pronounces the following Judgement:

I. The Applicant contends that the decision of the Executive Director to maintain the classification of the post encumbered by the Applicant at the G-6 level was tainted by legal and factual error. He requests that his promotion from the G-6 to the G-7 level, which was granted effective 1 September 2000 following the subsequent reclassification of his post, be given retroactive effect to 1 January 1998 and, for seniority purposes, 1 January 1997.

II. The Tribunal notes that the reclassification of a post does not automatically result in promotion for the incumbent. In the instant case, ITC/CIR/392 provided that promotion was subject to the availability of posts at that level within budget and post limitations. It was also subject to other conditions, as explained to the Applicant by the Chief, Personnel Section, on 25 August 2000, including: a recommendation for upgrading the post; an unequivocal recommendation from the supervisor; subsequent review and approval by the APC; and, the acceptance of the APC recommendation by the Executive Director, ITC. These conditions were fulfilled when the Applicant's post was upgraded in 2000, however the Applicant claims that it should have occurred some two years earlier.

III. As the personal promotion of the Applicant and the reclassification of his post are inherently intermingled, the Tribunal must pronounce on whether his post, as a matter of law, should have been upgraded on 1 January 1998, the date proclaimed by the Applicant.

In December 1997, a job classification exercise was undertaken at ITC. The external classifier recommended that the Applicant's post should remain at its existing G-6 level. In accordance with the provisions of ITC/CIR/392, the Applicant requested re-examination of this classification by a professional classifier who also recommended that the post should remain classified at the G-6 level. The Applicant then requested review of this classification, again in accordance with the provisions of ITC/CIR/392, by the JCARC, which proceeded to recommend that the post be classified at the G-7 level. The Tribunal notes that the JCARC was not an expert body but that, on the contrary, the members were selected for the job for reasons unrelated to expertise in classification matters. Indeed, they were subsequently informed that they had been "selected for this task, not because of [their] technical expertise in the classification of posts but because [they were] viewed by the staff and management of ITC as colleagues with integrity". They were instructed on their task only a week before meeting. The Executive Director, concerned as to the role the Executive Secretary appeared to have played in the proceedings of the JCARC, then decided to seek the assistance of a professional classification consultant. The latter recommended that the post remain classified at the G-6 level, which recommendation the Executive Director accepted. The Respondent contends that as the JCARC was an advisory body which submitted a recommendation to the Executive Director, the latter was free to accept its recommendation; follow the recommendation of the classification consultant; or, make a decision following neither recommendation.

Some time later, following another classification exercise which was performed in July 2000, the Applicant's post was upgraded to the G-7 level. The Applicant was informed that,

> "[a]s a result of a recent classification analysis, the Executive Director [had] accepted the recommendation that the functions of the post currently occupied by [him] as described in the attached Job Description Questionnaire, [corresponded] to those of a post graded at the G-7 level".

In other words, the Applicant's newly assigned functions justified the reclassification of his post. Even if, as contended by the Applicant, his new functions did not amount to much, they may have made the difference in favour of the post being reclassified, especially as the points

allocated to the Applicant's post during each of the earlier classifications had come very close to the number of points required for classification at the G-7 level.

IV. The Tribunal is satisfied that the final decision regarding classification of the post fell within the discretion of the Executive Director. (See Judgement No. 784, *Knowles* (1996).) This discretion is not unfettered, however, as the Tribunal has repeatedly stated that it may be vitiated by the existence of bias, prejudice, discrimination, lack of due process or other improper motivation. The Tribunal recalls its Judgement No. 792, *Rivola* (1996), wherein it stated "[i]t is clear to the Tribunal that it cannot substitute its judgement for that of the Respondent in job classification matters ... The role of the Tribunal is to determine whether, under the circumstances, the Respondent acted within his reasonable discretion." In the instant case - as in any case where arbitrariness, discrimination or other such improper motivation is alleged - the *onus probandi*, or burden of proof, rests upon the Applicant. (See Judgements No. 639, *Leung-Ki* (1994); *Knowles*, *ibid.*; and, No. 870, *Choudhury* (1998).) The Applicant has failed to discharge his burden and to persuade the Tribunal that the Executive Director's decision was so vitiated.

V. In view of the foregoing, the Application is rejected in its entirety.

(Signatures)

Julio BARBOZA
Vice-President, presiding

Spyridon FLOGAITIS
Member

Brigitte STERN
Member

Geneva, 26 July 2002

Maritza STRUYVENBERG
Executive Secretary